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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether this Court's decision in *Katz* v. *United States*, 389 U. S. 347 (1967) modified the holding of *Hester* v. *United States*, 265 U. S. 57 (1924) to the extent of requiring a search warrant for the search of a highly secluded field from which the public is excluded when a reasonable expectation of privacy can be shown to exist in that field.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-15

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit En Banc [Pet. App. 31-66] is reported at 686 F. 2d 356 (1982). The opinion of the panel of the Court of Appeals for the Sixth Circuit is reported at 657 F. 2d 85 (1981). The opinion of the District Court for the Western District of Kentucky is not reported. [Pet. App. 21-24.]

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit En Banc was decided and filed on May 5, 1982. The Petition for a Writ of Certiorari was filed on July 2, 1982. The Petition was granted on January 24,

1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutory Provisions:

21 U.S.C. §841(a), provides as follows:

> Except as authorized by this title it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or
>
> (2) to create, distribute or dispense or possess with intent to distribute or dispense, a counterfeit substance.

18 U.S.C. §2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner is a 63 year-old retired farmer who was charged with manufacturing marijuana in violation of 21 U.S.C.S. §841(a)(1) and 18 U.S.C.S. §2. The United States District Court for the Eastern District of Kentucky held an evidentiary hearing on November 13, 1980, and ordered that the search of the Petitioner's property without a search warrant was in violation of the Petitioner's Fourth Amendment rights and, therefore, ordered that all evidence obtained as a result of that search must be suppressed. [Pet. App. 20.]

The Respondent filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on November 20, 1980. A panel of the Sixth Circuit, in an opinion rendered on August 7, 1981, affirmed the District Court's holding that the owner of an open field is entitled to Fourth Amendment protection if he has a reasonable expectation of privacy in his property. [Pet. App. 28, 29.]

The Respondent filed a timely petition for rehearing en banc which was granted. The Sixth Circuit, in an opinion rendered on May 5, 1982, reversed its previous finding and held that the open fields doctrine first announced in *Hester* v. *United States*, 265 U. S.

57 (1924), is valid as applied to the facts of this case. [Pet. App. 37, 38.]

The Petitioner filed a Petition for a Writ of Certiorari, which was granted by this Court on January 24, 1983.

The facts adduced at the suppression hearing demonstrate that the Petitioner is a 63 year-old retired farmer, who had been employed by the Kentucky Department of Highways as a laborer, and, on the date of the search, lived on his farm with his wife and daughter. Portions of Petitioner's land were leased to farmers for the purpose of growing corn. The marijuana discovered by the Kentucky State Police was located on two of these leased fields. [J.A. 9, 27.]

On or about July 18, 1980, Kentucky State Policemen Ben Hadley and Jimmy Antle received a tip from an anonymous informer to the effect that marijuana could be found growing on the Petitioner's farm. The State Police proceeded directly to the Petitioner's farm without making any attempt whatsoever to procure a warrant for the search of the Petitioner's farm. [JA. 12.] The State Police did not have probable cause for the search. No exigent circumstances were present. [Pet. App. 40, f.n. 4.]

The State Police approached the Petitioner's farm on a state road and then turned onto Sugar Camp Road which led to the Petitioner's land which was posted with a number of "No Trespassing" signs. [J.A. 26.] The State Police ignored the "No Trespassing" signs and proceeded several hundred yards

to the Petitioner's residence. [J.A. 4, 5.] The State Police had no warrant and made no attempt to procure the Petitioner's consent to enter the premises which were clearly posted with "No Trespassing" signs at four different intervals. [J.A. 16, 26.]

The State Police had proceeded approximately three-quarters of a mile beyond the Petitioner's house when they encountered a gate on the property that blocked the road. [J.A. 16.] This gate was locked with a chain and padlock and was posted with a "No Trespassing" sign. [J.A. 26, 29.]

Unable to proceed further by automobile, the State Police continued on foot around the locked gate to a barn on the property which was located about three-fourths of a mile beyond the house. [J.A. 3.] At this point, someone appeared near the barn and called to them to come back, explaining that hunting was not allowed. [J.A. 3, 4.] The State Police ignored this request to leave and proceeded further through fields and wooded areas until they entered a secluded field and found marijuana. [J.A. 4.]

It is important to note that it is undisputed that the field where the marijuana was found is *completely secluded*. The government has stipulated that this field is not visible from the Cumberland River which borders a major portion of the Petitioner's land. Nor is it visible from the posted and locked gate which was ignored by the State Police, nor from the Petitioner's house. [J.A. 41, 30, 31.] In other words, the marijuana could not be seen by anyone standing on land other than that owned by the Petitioner, and then only

after the State Police had ignored five "No Trespassing" signs, a locked gate, verbal warnings to not trespass, and had traveled about one mile and a half onto Petitioner's property.

The State Police then left the Petitioner's farm and met him on the highway returning from a neighbor's house and placed him under arrest for cultivating marijuana.

SUMMARY

Petitioner respectfully requests this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit which held that the Kentucky State Policemen's warrantless search of Petitioner's property did not violate Petitioner's Fourth Amendment right against unreasonable search and seizure.

The government contends the warrantless search of Petitioner's property was made pursuant to one of the exceptions to the Fourth Amendment warrant requirement, the so-called open fields doctrine. It is Petitioner's position that the government cannot justify the unlawful search in this case because the open fields doctrine has been modified by this Court's decision in *Katz* v. *United States*, 389 U. S. 347 (1967).

Searches conducted outside the judicial process without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment. *Katz, supra.* The government bears the burden of establishing that this warrantless search was conducted within the narrow confines of a well-established and

specifically delineated exception to the requirements of the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971).

The open fields doctrine relied on by the government is the result of the combination of this Court's decisions in *Hester* v. *United States,* 265 U. S. 57 (1924) and *Olmstead* v. *United States,* 277 U. S. 438 (1928). The essence of the *Hester* decision was that evidence obtained as a result of observations made by police officers which could have been made by any member of the public was lawfully seized. *Olmstead* contributed a "constitutionally protected area" concept to the doctrine, declaring that open fields were not constitutionally protected areas. This per se locational approach to the open fields doctrine was criticized by the courts and was finally substantially modified by this Court in *Katz.*

The *Katz* decision established a two-part test for determining whether an individual has a reasonable, and therefore, constitutionally protected expectation of privacy: First, whether the individual had an actual —subjective—expectation of privacy; and secondly, whether this expectation is one which society is prepared to accept as reasonable.

The narrow holding in *Hester,* that federal agents could trespass onto an area from which the public was not excluded and view that which was exposed to the public without violating the Fourth Amendment, remained intact after the *Katz* decision. *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861

(1974). At the same time, *Olmstead's* "constitutionally protected area" rationale was overruled. *Katz,* 389 U. S. at 353. Open field searches, therefore, are to be analyzed according to this standard: warrantless searches for objects (1) not exposed to the public, and (2) located in areas from which the public is excluded, are subject to the reasonable expectation of privacy test of *Katz.*

This Court reaffirmed this standard of analysis in *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978), in which the Court stated that, without a warrant, a government agent is in no better position than a member of the public.

In suppressing the evidence obtained by the unlawful search in this case, the District Court found that the Petitioner exhibited a reasonable expectation of privacy: "Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in his property." [Pet. App. 23.] The Kentucky State Police ignored verbal warnings, fences posted with "No Trespassing" signs, a locked gate, and more than a mile of densely wooded land in the course of their unlawful search. **According to the standard set forth by this Court for analysis of searches under the Fourth Amendment, the Kentucky State Police clearly and purposefully violated Petitioner's Fourth Amendment right against unreasonable search and seizure, and the evidence obtained as a result of this unlawful search should be suppressed.**

ARGUMENT

I. The Kentucky State Police Intentionally Circumvented the Warrant Requirement of the Fourth Amendment and Searched Petitioner's Farm Without Exigent Circumstances or Other Justification and the Trial Court Properly Suppressed the Evidence Obtained as a Result of This Unlawful Search.

A. The Government Has Failed to Establish That the Warrantless Search of Petitioner's Property Was Conducted According to an Exception to the Fourth Amendment Warrant Requirement.

The Fourth Amendment to the United States Constitution was proposed as a protection against arbitrary governmental intrusions on the privacy of its citizens. Its importance in the scheme of liberty contemplated by the founding fathers is most evident in the context of its origins. Early in our nation's history, government officials issued writs of assistance and general warrants to revenue officers, empowering them, in their discretion, to search places for smuggled goods. A great and vocal opposition arose to these abusive and warrantless writs, the opposition John Adams referred to when he declared:

> Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. *Boyd* v. *United States,* 116 U. S. 616, 623-630 (1886).

In response to these writs, and other intrusive acts of the government, the Fourth Amendment was drafted in 1787. The essence of the protection provided by the

Fourth Amendment is the warrant requirement. The Amendment reads, in pertinent part:

> [A]nd no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This requirement was explained by this Court, in the recent case of *Payton* v. *New York,* 445 U. S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). The Court noted that the warrant requirement was interposed between the public and the police because the decision to search or seize should rest with a detached and disinterested party.

> At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home *or expectation of privacy* must be strictly circumscribed. [Citation omitted.] To achieve that end, the framers of the amendment interposed a warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field but rather with a detached and disinterested Magistrate. [Emphasis added.] *Payton,* 445 U. S. at 582, f.n. 17, citing *McDonald* v. *United States,* 335 U. S. 451, 93 L. Ed. 152, 69 S. Ct. 191 (1948); *Johnson* v. *United States,* 333 U. S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948).

The detached and disinterested magistrate plays an important role in the protection of the rights preserved by the Fourth Amendment, and, as noted above, the

individual's *expectation of privacy* is central to the determination of the interests protected by that Amendment. This Court in *Johnson* v. *United States, supra,* noted the Fourth Amendment prohibits police officers actively engaged in "the often competitive enterprise of ferreting out crime" from using unlimited discretion in search and seizure:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. 335 U. S. at 14.

This Court's decision in *McDonald* v. *United States, supra,* reaffirmed that evidence obtained by a search and seizure made without a search warrant should be suppressed when no compelling reasons justify the non-procurement of a search warrant. In *McDonald* this Court again reasoned that the right of privacy was too precious to entrust to the discretion of police officers and that in order to justify a warrantless search, police officers must show some type of exigent circumstances. *Id.,* at 455.

The record in this case reveals that there were no compelling reasons or exigent circumstances to justify the non-procurement of a search warrant. The Kentucky State Police unjustifiably circumvented the warrant requirement. The State Police received a tip

from an anonymous informer to the effect that marijuana could be found growing on the Petitioner's farm. The Police proceeded directly to the Petitioner's farm without making any attempt whatsoever to procure a warrant for the search of Petitioner's farm.

This Court has strictly construed any proposed abrogations of the privacy interest protected by the Fourth Amendment. "[S]earches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States,* 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041, 2043 (1973); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454-455, 29 L. Ed. 2d 564, 91 S. Ct. 2022, 2031-2032 (1971). The government bears the burden of establishing that a warrantless search was conducted within the narrow confines of an established exception to the Fourth Amendment. *Coolidge,* 403 U. S. at 455. Petitioner submits that the government has failed to establish that the warrantless search of the Oliver farm was conducted within one of these narrow exceptions. The evidence was seized in violation of the Fourth Amendment and the search and seizure is not excusable upon the grounds of any exception to the Fourth Amendment. The evidence was properly suppressed by the trial court applying the exclusionary rule. [Pet. App. 19.]

The exclusionary rule was developed to provide protection against precisely the sort of constitutional violation presented in this case. This Court, in *Weeks* v. *United States,* 232 U. S. 383 (1914) held that evidence seized in violation of a defendant's Fourth Amendment rights could not be used against that person at trial. The exclusion of the evidence is particularly important in this case, as the actions of the State Police demonstrated an obvious disregard for the Petitioner's Fourth Amendment rights.

The State Police, acting on an anonymous tip and without probable cause, drove to Petitioner's farm without obtaining a warrant. They drove onto Petitioner's land, past four "No Trespassing" signs, past his home, and to a locked gate, which was posted with another "No Trespassing" sign. The State Police left their car at the gate, walked between the posted gate and a fence, and proceeded further into Petitioner's private, secluded land. When they were three-quarters of a mile beyond Petitioner's home, someone called to them requesting that they leave the property. The State Police did not leave, but continued further, walking another half of a mile through densely wooded and overgrown riverbottom land before discovering the marijuana. The government stipulated that the fields are not visible from the river, which is separated from the fields by "impenetrable barriers". [J.A. 41.] A primary justification for the exclusionary rule is that its application deters repeated constitutional violations such as those in this case. The government should not be allowed to benefit from its unlawful conduct. See,

Elkins v. *United States*, 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960).

B. This Court Ruled in *Katz* v. *United States* That the Per Se "Constitutionally Protected Area" Open Fields Doctrine Relied Upon by the Government to Justify the Unlawful Search and Seizure Is No Longer Controlling Because the Fourth Amendment Protects People, Not Places.

According to *Katz* v. *United States, supra*, the Court must first look for a specifically established and well-delineated exception to the warrant requirement whenever it is presented with a warrantless search that implicates the Fourth Amendment. The government alleges that the search in question was legitimate under the so-called open fields doctrine. The government's reliance upon the doctrine does not justify the warrantless search in question. The open fields doctrine is not a specifically established and well-delineated exception to the Fourth Amendment.

The open fields doctrine relied on by the government is the result of a combination of this Court's decisions in *Hester* v. *United States*, 265 U. S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924) and *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928). The synthesis of these decisions by the Courts of Appeal produced much confusion and an interpretation of Fourth Amendment rights that was unfaithful to the decrees of the authors of that Amendment.

In *Hester* the Court stated, simply, that Fourth Amendment protections did not extend to open fields. 265 U. S. at 59. In *Hester*, the Court noted that reve-

nue officers did not violate the defendant's Fourth Amendment rights even though they trespassed onto his land, because the defendant's own acts and those of his associates disclosed the evidence. 265 U. S. at 58. Any member of the public could have observed what the revenue agents observed. Indeed, while the agents were at the house, other cars stopped to see Mr. Hester. *Id.* The public was not excluded from viewing the broken and discarded jars of moonshine spotted by the revenue agents. The *Hester* opinion itself, then, supported its open fields decision with evidence that the area or item searched was exposed to the public.

The phrase "open fields" was further described by this Court in *Olmstead*. The *Olmstead* court determined that there had to be an actual physical intrusion into the defendant's house or surrounding curtilage before the defendant could allege a violation of his Fourth Amendment rights. 277 U. S. at 466. In *Olmstead* an illegal liquor importing conspiracy was uncovered by federal prohibition officers by means of wire taps. The Court based its decision admitting the evidence on an analysis which focused on physical invasion of constitutionally protected areas. The open fields standard that was the result of this analysis could be stated: the open field area beyond the curtilage is not an area entitled to Fourth Amendment protection.

This doctrine was flawed from its inception because it attempted to apply narrow utilitarian, common law property concepts to the far-reaching and fundamental protections envisioned by the authors of the Fourth

Amendment. The term "curtilage" was originally used at common law to describe those buildings which could be the subject of burglary. See W. LaFave & A. Scott, *Criminal Law*, 712-13 (1972). Curtilage is generally defined as the enclosed space of ground and buildings immediately surrounding a dwelling house. Black's Law Dictionary, 346 (rev. 5th ed. 1979).

This flaw in the doctrine was noted by Justice Brandeis in a dissent to the *Olmstead* decision. Justice Brandeis realized that such a narrow interpretation of the Amendment, although easy to apply, did not effectuate the intent of the framers. 277 U. S. at 472, Brandeis, J., dissenting. Caution is required, he warned, when interpreting the Constitution, and ease in application alone should not be a standard for this interpretation:

> Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. 277 U. S. at 473.

The locational approach to the Fourth Amendment was questioned by later decisions of this Court. In *Silverman* v. *United States*, 365 U. S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961), this Court discredited the "material object" or "physical place" requirement from cases such as *Olmstead* and *Hester* and held that conversations could be the subject of an illegal search. 365 U. S. at 512.

In *Maryland Penitentiary* [*Warden*] v. *Hayden*, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967), this Court echoed Justice Brandeis' earlier criticisms of the use of rigid property concepts in Fourth Amendment analysis. The Court stated that it "refused" to allow such subtle distinctions to govern constitutional analysis:

> In determining whether someone is a 'person aggrieved by an unlawful search and seizure, we have refused' to impart into the law . . . subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historical. 387 U. S. at 305.

The *Hayden* Court concluded that the principal objective of the Fourth Amendment was the protection of privacy rather than property. *Id.*, at 304.

The open fields doctrine of *Hester* and *Olmstead* received its final and complete discreditation by this Court's decision in *Katz* v. *United States, supra.*

Katz overruled the Fourth Amendment "constitutionally protected areas," or, actual physical invasion, analysis utilized by the courts since *Olmstead.* In *Katz,* the scope of protection provided by the Fourth Amendment was completely redefined; the relevant analysis was finally focused on privacy, rather than property concepts. The Court concluded that the Fourth Amendment protects people, not places. 389 U. S. at 353.

In *Katz*, the F.B.I. had listened to the defendant's conversations by placing an electronic device on the outside of a telephone booth. The government and the defendant briefed the issue of whether the telephone booth was a constitutionally protected area, according to the old Fourth Amendment analysis. This Court rejected the per se "locational" theory and concluded that such an analysis "deflects attention from the problem" of the scope of Fourth Amendment protection. *Id.*, at 350-353. Directly attacking the continued relevance of the *Olmstead* decision, the Court noted that "we have since departed from the narrow view on which the decision rested." *Id.*, at 352-353.

> Indeed, we have expressly held that the Fourth Amendment governs not only the service of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States, supra.* Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. *Id.*

The Court then concluded:

> **We conclude that the underpinnings of *Olmstead* and *Goldman* [316 U. S. 129 (1940)], have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. *Id.***

The property concepts of trespass and curtilage were thereby discredited by the Court in *Katz*. Thereafter, they were to be considered only as *factors*, not as conclusive determinations. In so finding, the Court referred to the basis for the Fourth Amendment warrant requirement. The purpose of that requirement, it stated, was to obtain an independent judicial review of the basis of the probable cause to search prior to the intrusion. *Id.*, at 357. To support this principle, the Court declared that "searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Id.*, at 357.

The *Katz* Court found that the defendant had in fact been subjected to an illegal search, because of the warrantless governmental intrusion into an area in which he had a justifiable expectation of privacy. *Id.*, at 353. The standard of scrutiny the Court has used in applying the *Katz* holding to search and seizure cases is derived from Justice Harlan's concurrence. The scope of Fourth Amendment protection in each case is determined by a two-part test:

> First, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation is one that society is prepared to recognize as reasonable. *Id.*, at 361.

Because *Olmstead* is "no longer controlling," and because the focus of Fourth Amendment analysis is now on persons rather than places, the discredited open

fields doctrine must be reassessed in accordance with this Court's decision in *Katz*.

II. According to This Court's Modern Open Fields Analysis the Warrantless Search of Petitioner's Farm Violated the Fourth Amendment Because the Petitioner Exhibited an Actual and Reasonable Expectation of Privacy in Securing the Area Searched Which Was Not Exposed to the Public and From Which the Public Was Excluded.

A. The Area Searched Was Not an Open Field.

The narrow holding in *Hester*, that federal agents could trespass onto an area *from which the public was not excluded* and view that which was exposed to public view without violating the Fourth Amendment, remained intact after the *Katz* ruling. *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U. S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974). At the same time, *Olmstead's* "constitutionally protected area" rationale was overruled. *Katz*, 389 U. S. at 353. Open field searches, therefore, are to be analyzed according to this standard: ***Warrantless searches for objects (1) not exposed to the public; and (2) located in areas from which the public is excluded, are subject to the reasonable expectation of privacy test of Katz.***

This standard represents the application of the sound principle from *Katz*, that the Fourth Amendment protects people, not places, to that part of the open fields doctrine from *Hester* that remained intact after *Katz*. This standard was also suggested by Judge Keith in his well-reasoned dissent to the en banc deci-

sion of the Sixth Circuit Court of Appeals, the decision from which this Petition arose. *United States* v. *Oliver,* 686 F. 2d 356 (6th Cir. 1982). [Pet. App. 31.]

The search in this case clearly violated Petitioner's Fourth Amendment right against unlawful search and seizure. The Kentucky State Police did not have a warrant, and the search was *not* conducted pursuant to a "specifically established and well-delineated exception". (See, *Katz, supra.*). The area searched was (1) not exposed to the public, and (2) was located in an area from which the public was excluded. The State Police ignored five "No Trespassing" signs, a locked gate, verbal warnings, and more than a mile of secluded and densely overgrown farm land in order to reach the area searched. The threshold question under the proper analysis, *"Was the public excluded from the area searched without a warrant?"*, is answered affirmatively.

This standard has been accepted by this Court as dispositive of Fourth Amendment problems similar to the case at bar. In *Air Pollution Variance Board* v. *Western Alfalfa,* 416 U. S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974), this Court held that a federal agent could trespass onto an area from which the public was not excluded and view that which was exposed to the public without violating the Fourth Amendment. The Court considered the area searched an "open field" because the public was *not* excluded, and the view was, in fact, exposed to the public. *Id.*, at 865. The defendant's claim that his Fourth Amendment right had been violated, therefore, was denied. The Court em-

phasized that while "the field inspector was on respondent's property we are not advised that he was on premises from which the public was excluded." *Id.*

The decision in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) refined this analysis, this Court concluding that, without a warrant, *a government agent is in no better position than a member of the public,* and, conversely, observations capable of being made by the public can be made by the government agents without a warrant. [Emphasis added]. *Id.*, at 315.

In *Marshall,* a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his business premises pursuant to statutory authorization from the Occupational Safety and Health Act of 1970. The Court ruled that such a statutory authorization was unconstitutional as it violated the Fourth Amendment. *Id.*, at 325. In reference to the government inspector, the Court stated:

> Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspection as well. *Id.*, at 315.

This analysis defines the essential issue, and accurately describes the modern application of the open fields doctrine; i.e., that the doctrine is legitimate only when applied to areas that are open to or are capable of being viewed by the public.

Further, it should be noted that *Western Alfalfa* and *Marshall* addressed the Fourth Amendment in light of administrative searches. This Court has long recognized that criminal cases demand an even higher standard of scrutiny. See *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), at 535-39; and *Marshall* v. *Barlow's, supra.* Therefore, an analysis of Fourth Amendment violations derived from these cases must be strictly applied to the facts of the criminal case at hand.

The Kentucky State Police in this case had no warrant. According to *Western Alfalfa* and *Marshall,* then, the State Police stood in no better position than a member of the public. Further, the area searched was not observable by the public. The Petitioner had posted his private gravel road. A locked metal gate blocked this gravel road. That gate was posted. The fields in question are highly secluded: they are bounded on all sides by woods, fences, and embankments and the Cumberland River. And, as conclusive evidence of Petitioner's intent to exclude the public, the Police, mistaken for hunters, were *told* "No Hunting. Come Back Up Here!" The area searched was not visible from the public road, or from the Cumberland River, along which it rested.

Because the area searched was highly secluded, and was not exposed to the public, and because the State Police had no warrant, the search should be analyzed according to the reasonable expectation of privacy test of *Katz*. As noted, this expectation of privacy is determined, according to *Katz*, by reference to (1) whether the individual has, by his conduct, exhibited an

actual (subjective) expectation of privacy, and (2) whether the individual's expectation of privacy is one that society is prepared to accept as reasonable.

B. The Petitioner Exhibited an Actual Expectation of Privacy Which Society Is Prepared to Accept as Reasonable.

It is clear that the Petitioner, by his conduct, exhibited an actual expectation of privacy. The District Court considered the circumstances of the warrantless search of the Petitioner's farm and concluded: "Short of posting guards at the entrance, it is difficult to see what else the defendant could have done to assert his privacy interest in this property." [Pet. App. 23.] The State Police encountered and ignored visual, physical, and verbal manifestations that the Petitioner expected privacy.

It is equally clear that the expectation of privacy Petitioner exhibited is one which society is prepared to accept as reasonable. It is easiest to address the reasonableness of this expectation by considering the practical effect of a ruling that Petitioner's expectation of privacy was not reasonable. Such a ruling would operate as a blank check to government agents everywhere, instructing them that, without a warrant, they are henceforth free to ignore the "No Trespassing" signs, locked gates, fences, and verbal warnings by farmers upon whose land they venture. Even more frightening is the spectre of court sanction, or worse, encouragement, of this obvious assault on the rights preserved to the citizens by the Fourth Amendment.

Sadly, such encouragement can be noted in the opinion of the Sixth Circuit Court of Appeals, in its decision overruling the District Court's suppression order:

> In weighing the privacy interest of the owner of open fields against the public interest in law enforcement's making *random* investigations to detect the production of drugs and moonshine, the public interest should prevail. [Emphasis added]. [Pet. App. 38, f.n. 5.]

Not only did the Court assume, quite incorrectly, that the field in question was "open,"—when according to this Court in *Western Alfalfa* and *Marshall* it was not—but the Court also chose to ignore the constitutionally-mandated nexus between probable cause, the warrant requirement, and the Fourth Amendment. Petitioner submits the public interest is more fully served by adherence to the constitutional rights preserved in the Fourth Amendment.

III. The United States Courts of Appeal Have Held That Where the Area Searched Was Not Exposed to the Public and Measures Were Taken to Exclude the Public the Individual's Expectation of Privacy Is Reasonable and a Warrantless Search of That Area Is a Violation of the Fourth Amendment.

The United States Courts of Appeal have rejected a per se approach to open field searches and have supported Petitioner's argument that the open field doctrine must be reassessed in light of *Katz'* reasonable expectation of privacy analysis. The Sixth Circuit, however, retained the discredited per se locational ap-

proach. Other Circuits have extended the protection provided by the Fourth Amendment by analyzing the facts in reference to the *Katz* standard.

In *United States* v. *Lace,* 669 F. 2d 46 (2d Cir. 1982), cert. den. 103 S. Ct. 121 (1982), the Court of Appeals for the Second Circuit cited what it called the "*Hester-Katz* rationale" as controlling in open field cases. 669 F. 2d at 51. The "*Hester-Katz* rationale" is precisely the standard Petitioner has herein submitted to this Court; that what is observable by the public is observable by the police as well, and, what is excluded from the public, is similarly excluded from the warrantless police. Once excluded, the burden is on the police to demonstrate that the expectation of privacy was not manifest, or was unreasonable.

The *Lace* Court held that evidence of the defendant's activities which were visible to the public was properly observable by the police, as well. *Id.* The Court relied on *Katz, Marshall* v. *Barlows, Inc.,* and *Western Alfalfa* for its decision. The *Lace* Court noted the abundant authority for its holding:

> What was observable by the general public was observable without a warrant by the police as well. *Marshall* v. *Barlows, Inc.,* 436 U. S. 307, 315, 98 S. Ct. 1916, 1921, 56 L. Ed. 2d 305 (1978); see *United States* v. *Dionisio,* 410 U. S. 1, 14, 93 S. Ct. 764, 771, 35 L. Ed. 2d 67 (1973), (citing *United States* v. *Doe,* 547 F. 2d 895, 898-99 (2d Cir. 1972), cert. denied, 410 U. S. 941, 93 S. Ct. 1376, 35 L. Ed. 2d 608 (1973)); *United States* v. *Miller,* 589 F. 2d 1117, 1133-34 (1st Cir. 1978), cert. denied, 440

U. S. 958, 99 S. Ct. 1499, 59 L. Ed. 2d 771 (1979); *United States* v. *Knight,* 451 F. 2d 275, 278 (5th Cir. 1971), cert. denied, 405 U. S. 965, 92 S. Ct. 1171, 31 L. Ed. 2d 240 (1972).

Among the lower court decisions adopting the Hester-Katz rationale, the following are illustrative:

United States v. *Varkonyi,* 645 F. 2d 453 (5th Cir. 1981).

View from roadway of illegal aliens working in delivery area of defendant's fenced scrap metal yard.

Patterson v. *National Transportation Safety Board,* 638 F. 2d 144 (10th Cir. 1980).

Examination of exterior of plane parked at private airport.

United States v. *Magana,* 512 F. 2d 1169 (9th Cir.), cert. denied, 423 U. S. 826, 96 S. Ct. 42, 46 L. Ed. 2d 43 (1975).

View of defendant in front of garage from police car driven into private residential driveway.

United States v. *Hensel,* 509 F. Supp. 1376 (D.Me. 1981).

Surveillance of outdoor premises with a telescope, a spotting scope, binoculars, and a nightscope, plus aerial surveillance and physical entry onto driveway.

See also *United States* v. *Arboleda,* 633 F. 2d 985, 991-92 (2d Cir. 1980); *United States* v. *Mullinex,* 598 F. Supp. 512 (E.D. Ky. 1980); *United States*

v. *DeBacker,* 493 F. Supp. 1078 (W.D. Mich. 1980). *Id.,* at 50, 51.

The Fifth Circuit has enforced an even more expansive interpretation of Fourth Amendment analysis under the *Katz* decision. In *United States* v. *Holmes,* 521 F. 2d 859 (5th Cir. 1975), the Court required that the government official have a *right* to be in the place from which the view of the incriminating evidence is obtained. The *Holmes* court was faced with a warrantless government search of a shed on the defendant's property. The Court began its discussion by repeating an early Supreme Court admonishment that applies with equal force to the search of Petitioner's farm:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *Id.,* at 866, citing from *Boyd* v. *United States,* 116 U. S. at 635.

In regard to the search of the shed, the Court held that where the government agent had trespassed upon defendant's rural property and peered into a hole in the shed for the sole purpose of securing evidence of a crime, the agent's action was an unlawful search and seizure and did *not* fall within the open field exception to the warrant requirement. 521 U. S. at 870.

Unlike the Petitioner herein, the landowner in *Holmes* did not post "No Trespassing" signs, did not erect any fences or gates, and did not call to the agents

to "come back." Yet, the Court found that a reasonable expectation of privacy had been exhibited simply because of the secluded character of the land searched. A dweller in a rural area, the Court stated, whose property is surrounded by dense growth need not anticipate government agents crawling through the underbrush:

> The government would have us ignore the character of the *Moody* property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, *a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away.* [Emphasis added. *Id.*, at 870.]

The Petitioner in this case, then, clearly exhibited his expectation of privacy. The character of his land was similarly, if not more, densely wooded and secluded, and, in addition, he posted his land, locked a gate, fenced the land, *and,* the unwanted intruders were told to leave.

The defendant's attempts to secure the area in question were determinative of his exhibited expectation of privacy, the Court held in *United States* v. *Dunn,* 674 F. 2d 1093 (5th Cir. 1982). In *Dunn* the police officers had crossed several fences before reaching the defendant's barn, into which they peered. The barn in *Dunn* was within the "curtilage," but the defendant's clear desire for privacy was held to be the decisive factor.

The Court noted that, while property concepts alone were no longer satisfactory for Fourth Amendment analysis, these distinctions were helpful in determining the reasonableness of the defendant's expectation of privacy. *Id.*, at 1100. The search was held to be violative of the Fourth Amendment, because the officers acted without a warrant and without exigent circumstances. The Court described the area searched and the area described closely resembles the area searched on Petitioner's farm, in terms of its secluded nature and the barricades erected to keep out intruders:

> The residence and the other buildings are in a small clearing almost entirely surrounded by trees. The house and the barns are not visible from the perimeter fence. There are interior fences, including one around the residence and one around the subject barn. Once inside the perimeter fence, it is necessary to penetrate at least one more fence before reaching the place where the officers stood while examining the interior of the barn. *Id.*, at 1099.

The Court referred to Justice Brandeis' dissent to the *Olmstead* decision to explain the basis for its analysis. Justice Brandeis' dissent, the Court noted, provides a modern perspective of the intent of the framers of the Fourth Amendment:

> They conferred, as against the Government, the *right to be left alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the indi-

> vidual, whatever the means employed, must be deemed a violation of the Fourth Amendment. 674 F. 2d at 1098, f.n. 10.

In light of the measures taken by the Petitioner to exclude the public and the State Police from his farm, the Police intrusion was unjustified, and violative of the Fourth Amendment.

In *United States* v. *Taborda*, 635 F. 2d 131 (2d Cir. 1980) the Second Circuit applied the *Katz* test, explained it, and determined that the use of "enhanced viewing," such as telescopes, etc., violated the defendant's right to privacy, even if the viewing took place from an area at which the observer had a right to be. The Court discussed the *Katz* test as follows:

> We take the first factor to mean in essence that the defendant must have acted in such a way that it would have been reasonable for him to expect that he would not be observed;

and the second factor;

> requires that the action occur in a place in which society is prepared, because of its code of values and its notion of custom and civility, to give deference to a manifested expectation of privacy. *Id.*, at 137.

It cannot be disputed that the actions of the Petitioner in placing a locked gate on his drive, posting the property with "No Trespassing" signs, and living with his family on the land in question exhibited an expectation of privacy. Surely society's "code of values"

and "notion of custom and civility" have not been so eroded as to permit the government to ignore the manifest expression of a property owner's desire for privacy on his own land.

Air Pollution Variance Board v. *Western Alfalfa* and *Hester* v. *United States* were relied upon by the Tenth Circuit Court of Appeals in *Patterson* v. *National Transportation Safety Board,* 638 F. 2d 144 (10th Cir. 1980). The Court in *Patterson* held that, because the public had not been excluded from viewing what the government agent had viewed, the search was valid. *Id.,* at 146.

Even prior to this Court's decision in *Western Alfalfa* the Ninth Circuit in *United States* v. *Pruitt,* 464 F. 2d 494 (9th Cir. 1972) based its Fourth Amendment analysis on the question of whether, according to *Katz,* the defendant had exhibited a justified expectation of privacy by excluding the public from the area in dispute. The Court found that the area had *not* been excluded from public view because; ". . . any casual passerby would feel perfectly free to ascertain what it was he had found." *Id.,* at 496.

In this case it is clear that no "casual passerby" would have ignored vocal warnings to leave the property, "No Trespassing" signs, a locked gate, and more than a mile of densely wooded forest to view the secluded fields of the Petitioner. The *Katz* standard is the law, and Petitioner's actions in preserving his reasonable expectation of privacy entitle him to the protection of that law.

In *United States* v. *Freie*, 545 F. 2d 1217 (9th Cir. 1976), the Ninth Circuit Court of Appeals outlined the modern history of the open fields doctrine. In *Freie* the defendant had exhibited no reasonable expectation of privacy, and the search of an open area exposed to the public, near a parking spot on an airstrip to which any casual passerby would have access, was not violative of the Fourth Amendment. The Court based its decision on the *Katz* analysis that the Fourth Amendment protects people and not places, and that "the proper focus is no longer on common law property concepts," *Id.*, at 1223. The Court concluded:

> It now appears that *Hester* has no longer any independent meaning but merely indicates that open fields are not areas in which one traditionally might expect privacy. *Id.*, at 1223, citing *United States* v. *Magana*, 512 F. 2d 1169, 1170 (9th Cir. 1975); *Patler* v. *Slayton*, 503 F. 2d 472, 478 (4th Cir. 1974).

The Petitioner's farm land in this case was clearly not an "open field" for the purpose of post-*Katz* Fourth Amendment analysis. As *Hester* no longer has any meaning independent of *Katz*, this Court is urged to consider the expectation of privacy exhibited by the Petitioner.

Petitioner does not challenge the validity of the modified open fields doctrine when the land in question is in fact "open" to the public or is exposed to plain view. However, as here, when an area is neither

exposed to nor open to the public, it is not an open field, but, rather, an area in which the owner maintains a reasonable expectation of privacy.

In this case, the District Court found, and properly so, that the area trespassed upon and searched by the State Police was not an open field since it was totally secluded from the public by means of "No Trespassing" signs, a locked gate, and more than a mile of wooded forest. In addition, and as irrebuttable evidence of Petitioner's express manifestation of a "reasonable expectation of privacy," the State Police were *told to leave the property.* The field in question could not be seen from any point of public access. Simply stated, Petitioner possessed and exhibited a subjective and reasonable expectation of privacy in his farm land.

IV. Decisions From the United States District Courts and the State Courts of Appeal Have Modified or Limited the Application of the Open Fields Doctrine to Cases in Which the Area Searched Was Open to the Public and in Which the Individual Did Not Exhibit a Reasonable Expectation of Privacy.

The United States District Courts have consistently held that the open fields exception is not available where the warrantless search was conducted in an area from which the public was excluded. These courts have interpreted *Hester* as having been altered by *Katz.* The expectation of privacy exhibited by a landowner who fences and posts his land is, they seem to agree, one which, according to *Katz,* society is prepared to accept as reasonable.

In *Dow Chemical Co.* v. *U.S. By and Through Gorsuch*, 536 F. Supp. 1355 (E.D. Mich. 1982), the court rejected the Environmental Protection Agency's open field argument, holding that the exception did not apply to the warrantless high-powered photography of various parts of the Dow plant which were not otherwise exposed to the public. *Id.*, at 1372.

The court emphasized that citizens should not be forced to take unreasonable steps to protect their privacy interest guaranteed by the Fourth Amendment. Reasonable precautions, the court noted, are sufficient to entitle the citizen to Fourth Amendment protection:

> The Fourth Amendment should not be read as to require the citizens or businesses of this nation to take unreasonable measures to protect themselves from surreptitious governmental searches. This Court is not prepared to conclude that Dow must build a dome over its entire plant before it can be said to have manifested or exhibited an expectation of privacy. [Citation omitted.] Rather, what Dow "seeks to preserve as private", and then takes reasonable precautions to safeguard, is entitled to the protection of the Fourth Amendment. *Katz* v. *United States, supra. Id.*, at 1365.

Similarly, no farmer should be required to do more than did the Petitioner to secure his privacy. It should be kept in mind that, without a warrant, the Kentucky State Police were unlawfully trespassing and searching on Petitioner's highly secured farm. The government does *not* contend that the State Police had probable

cause for the warrantless search, or that, if they did have such cause, there were exigent circumstances that would excuse getting a search warrant. [Pet. App. 32, f.n. 1.]

The *Dow Chemical* court commented that,

> We should not require a person or corporation to take unreasonable precautions *to prevent another from doing that which he ought not to do in the first place. Id.*, at 1366. [Emphasis added.]

The defendants in *United States* v. *Balsamo*, 468 F. Supp. 1362 (D. Maine 1979) argued that police officers' entry into a certain wooded area violated their Fourth Amendment rights. The court, citing *Katz*, found that the defendants did not enjoy a legitimate or reasonable expectation of privacy in the area searched because, among other things, the defendants had not erected fences or "No Trespassing" signs around that area. 468 F. Supp. at 1379. In this case, all of Petitioner's farm was fenced or posted, and the State Police encountered five "No Trespassing" signs and a locked gate. [J.A. 16, 26.] (See, also, *United States* v. *Berkshire Beagle Club*, Slip. Op. M.B.D. No. 80-24-F (D. Mass., August 5, 1981); and *United States* v. *F.M.C. Corp.*, 428 F. Supp. 615 (W.D. N.Y. 1977).

On May 24, 1982, this Court granted certiorari in the case of *Florida* v. *Brady*, 406 So. 2d 1093 (Fla. Sup. Ct. 1981), No. 81-1636, for a consideration of this open fields question. In *Brady* the police officers crossed a dike, rammed through a gate, cut the chain lock on another gate, cut or crossed posted fences, and

proceeded several hundred feet to their observation posts deep into private property. The Supreme Court of Florida held that the warrantless search violated the Fourth Amendment. The Court insisted that fences and locked gates are plain evidence of the owner's expectation of privacy, under *Katz*. *Id.*, at 1095.

In this case, the Petitioner's expectation of privacy was exhibited, and justified. As Judge Keith noted in his dissent to the Sixth Circuit en banc opinion below, "*virtually every court which has considered the issue* has held that the open fields doctrine is not a per se rule sanctioning all warrantless searches outside the curtilage:"

> See e.g., *Wilson*, 620 F. 2d 1201 (7th Cir. 1980); *Miller*, 589 F. 2d 1134; *Patler*, 503 F. 2d 472; *Lace*, Slip. Op. No. 81-1098; *Western Alfalfa*, 416 U. S. 861; *Edmonds*, 611 F. 2d 1386; *Patterson*, 638 F. 2d 144; *Pruitt*, 464 F. 2d 494; *Freie*, 545 F. 2d 1217; *United States* v. *Jackson*, 588 F. 2d 1046, 1053 n. 12 (5th Cir. 1979); *Ramapuram*, 632 F. 2d 1149; *Van Dyke*, 643 F. 2d 992; *DeBacker*, 493 F. Supp. 1078; *United States* v. *Noe*, 494 F. Supp. 1032 (E.D. Ky. 1980); *Balsamo*, 468 F. Supp. 1363; *Heer*, 406 F. Supp. 609; *Berkshire Beagle Club*, Slip Op. M.B.D. No. 80-24-F; *FMC Corporation*, 428 F. Supp. 615; *Byers*, 359 So. 2d 84; *Brady*, 406 So. 2d 1093; *State of Nebraska* v. *Camper*, 209 Neb. 376, 307 N. W. 2d 820 (Neb. Sup. Ct. 1981); *State of Tennessee* v. *Lakin*, 588 S. W. 2d 544 (Tenn. Sup. Ct. 1979); *State* v. *Stanton*, 490 P. 2d 1274 (Or. App. 1971); *State of New Mexico* v.

Chort, 91 N.M. 584, 577 P. 2d 892 (N.M. App. 1978); *People of Colorado* v. *McClaugherty,* 566 P. 2d 361 (Colo. Sup. Ct. 1977); *State of Iowa* v. Bakker, 262 N. W. 2d 538 (Iowa Sup. Ct. 1977); *State of Hawaii* v. *Stachler,* 570 F. 2d 1323 (Hawaii Sup. Ct. 1977); *Phelan* v. *The Superior Court of Mariposh County,* 90 C.A. 3d 1005 (Cal. App. 1979); *People of the State of Illinois* v. *Dasenbrock,* 96 Ill. App. 3d 625 (Ill. App. 1981); *Gaylord* v. *State of Arkansas,* 613 S. W. 2d 409 (Ark. App. 1981). *Giddens* v. *State of Georgia,* 156 Ga. App. 258, 274 S. E. 2d 595 (Ga. App. 1980), cert. denied, 101 S. Ct. 1733 (1981). [Pet. App. 64, 65.]

The government's sole attempted justification for the unlawful search of Petitioner's farm is based upon the open fields doctrine which has been modified, discredited, or overruled by this United States Supreme Court, the United States Courts of Appeal, the United States District Courts, and by the courts of appeal of the states. The search and seizure was clearly unlawful under the modern open fields doctrine which requires the determination of Petitioner's reasonable expectation of privacy under *Katz* v. *United States.*

CONCLUSION

The Decision of the Sixth Circuit Court of Appeals Reversing Its Decision Affirming the District Court's Suppression of the Evidence Obtained by the Unlawful Search and Seizure Should Be Reversed.

The Sixth Circuit Court of Appeals, in reversing its decision suppressing the evidence obtained through

the warrantless search of Petitioner's farm, denied Petitioner the right to be protected against unreasonable search and seizure as guaranteed by the Fourth Amendment to the United States Constitution.

The analysis developed by this Court in *Hester* v. *United States, Katz* v. *United States, Air Pollution Varriance Board* v. *Western Alfalfa,* and *Marshall* v. *Barlow's, Inc.,* requires that the area in question be not exposed to the public, and that the person claiming Fourth Amendment protection exhibit a reasonable expectation of privacy in the area from which the public is excluded. The expectation of privacy must be one which society is prepared to accept as reasonable.

In this case the Kentucky State Police entered Petitioner's private property without a warrant and on the basis of an anonymous tip. The State Police ignored "No Trespassing" signs posted by the Petitioner, and drove several hundred yards on Petitioner's private gravel drive. The State Police encountered a posted and locked gate, and proceeded around this gate. The State Police ignored a verbal request to leave the property. The State Police trespassed one mile into Petitioner's property to the area in question. This area was not visible from the Cumberland River, which flows beside it, nor from the locked and posted gate, nor from the public roadway. Petitioner submits that society is prepared to accept an expectation of privacy in this area from which the Petitioner had excluded the public and in which he had exhibited his reasonable expectation of privacy. Petitioner also submits that

society is not prepared to accept the unlawful and unnecessary actions of the State Police in this case.

For the reasons hereinabove stated, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Sixth Circuit Court of Appeals which reversed its earlier decision affirming the suppression by the District Court of the evidence obtained in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted.

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